Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

PHILIP WILLIAMSON, ITZIK RIEF, RONDA KIRLIN AND THOMAS PAINTER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit, reversing the district court, correctly held that:

(A) Employees who are prevented from claiming overtime under the Fair Labor Standards Act (FLSA) by their employer's fraudulent threats of termination are ***not*** protected by the FLSA's anti-retaliation provision, 29 U.S.C. § 215(a)(3); and, therefore,

(B) The employees' state common law fraud claims to recover that same overtime are ***not*** preempted by the FLSA's comprehensive remedial scheme, which conflicts with the state common law scheme in three substantial respects: opt-in versus opt-out classes; the statute of limitations; and, if the Eleventh Circuit is correct, the recoverability of punitive damages.

2. Whether the Ninth Circuit -- in conflict with the Eleventh Circuit, but in agreement with the Seventh Circuit -- is correct that punitive damages are recoverable for a violation of the FLSA's anti-retaliation provision.

LIST OF PARTIES

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all parties to the proceeding before the United States Court of Appeals for the Ninth Circuit:

General Dynamics Corporation, Appellee below, has no parent corporation. No publicly held company owns ten percent or more of the stock of General Dynamics Corporation.

Philip Williamson, Itzik Rief, Ronda Kirlin and Thomas Painter, Appellants below, are individuals.

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PETITION FOR A WRIT OF CERTIORARI

General Dynamics Corporation (General Dynamics) respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit holding that Section 215(a)(3) of the Fair Labor Standards Act (FLSA) provides no remedy to employees who are prevented by their employer's threats of termination from claiming FLSA overtime by joining a pending FLSA opt-in class action and, therefore, the employees' common law fraud claims seeking that overtime are not preempted by the FLSA's comprehensive remedial scheme.

OPINIONS BELOW

The opinion of the Ninth Circuit, 208 F.3d 1144 (9th Cir. 2000), is reprinted at Appendix A, Pet. App. 1a-31a. The order of the Ninth Circuit denying the petition for rehearing and petition for rehearing en banc is reprinted at Appendix C, Pet. App. 39a.

The unpublished opinion of the United States District Court for the Southern District of California, holding, *inter alia*, that plaintiffs' claims are preempted by the FLSA, is reprinted at Appendix B, Pet. App. 32a-38a.

JURISDICTION

The Court of Appeals entered its decision on April 12, 2000. On April 21, 2000, petitioners

timely filed a petition for rehearing and petition for rehearing en banc. On May 23, 2000, the Court of Appeals denied the petition for rehearing and the petition for rehearing en banc. Pet. App. 39a. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves those sections of the Fair Labor Standards Act (FLSA) 29 U.S.C. § 201, *et seq.*, that comprise the FLSA's comprehensive remedial scheme, 29 U.S.C. §§ 206-07, 215-16, 255-56, 260, including the FLSA's anti-retaliation provision, 29 U.S.C. § 215(a)(3). The relevant sections of the FLSA are reprinted at Appendix D, Pet. App. 40a-46a.

STATEMENT OF THE CASE

The gravamen of plaintiffs' complaint, brought as a purported class action under state common law, is that plaintiffs were intimidated and coerced by their employer, through fraudulent threats and promises, not to join a pending FLSA action seeking unpaid overtime compensation. The decision below, in relevant part, was that plaintiffs were not protected by the FLSA's anti-retaliation provision and that, therefore, plaintiffs' common law fraud claims for unpaid overtime were not preempted by the FLSA.

Background: The *Sena* Case and Settlement

In July 1991, a group of General Dynamics salaried exempt[1/] employees brought a class action under the FLSA to recover unpaid overtime compensation. *Sena, et al. v. General Dynamics Corp.*, No. 91-0965-B (AJB) (S.D. Cal.) (*Sena*). The *Sena* plaintiffs alleged that General Dynamics had violated the FLSA by permitting deductions to be taken from salaried exempt employees' salaries for absences of less than a full day. (R. 186.) The effect of such deductions, the *Sena* plaintiffs alleged, was that the exempt status of all General Dynamics salaried employees was forfeited, thus requiring that they all be paid overtime for work over 40 hours in any workweek.

The legal basis of the *Sena* action was the Ninth Circuit's then recent decision in *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert.*

1/ "Salaried exempt" employees are those employees working in executive, administrative, or professional positions and compensated on a salary basis, who are thereby exempt from the overtime provisions of the FLSA, *i.e.*, they need not be paid additional compensation for work in excess of 40 hours per week.

denied, 498 U.S. 1068 (1991)[2/], which held that the mere "theoretical possibility" of impermissible pay deductions was sufficient to impose liability for overtime pay on an employer such as General Dynamics. *See Auer v. Robbins*, 519 U.S. 452, 456-60 (1997) (citing the "theoretical possibility" standard of *Abshire* and other cases as one side of a split in the circuits). In *Auer*, however, this Court rejected the *Abshire* standard for FLSA liability under the salary basis test, in favor of a narrower standard that would "avoid[ ] the imposition of massive and unanticipated overtime liability" on employers. 519 U.S. at 459-61. It is an irony of the instant case that plaintiffs seek to recover for allegedly being defrauded of rights that were based on a decision -- *Abshire* -- that has been overruled and thoroughly discredited. *See Childers v. City of Eugene*, 120 F.3d 944, 947 (9th Cir. 1997) ("*Auer* therefore implicitly overrules *Abshire*"); *Stanley v. City of Tracy*, 120 F.3d 179, 183 (9th Cir. 1997) (similar).

In contrast to a normal class action, such as one governed by Rule 23 of the Federal Rules of Civil Procedure, the FLSA's unique class action procedures require a claimant affirmatively to opt into the lawsuit by written consent in order to be a class member. 29 U.S.C. § 216(b). The FLSA's

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2/ The *Sena* complaint specifically cited the *Abshire* decision. (R. 576.)

affirmative opt-in requirement applied to those General Dynamics employees who wished to participate in *Sena*. (*See* R. 186-87.)

In 1993, four years before this Court overruled *Abshire*, a tentative settlement was reached in *Sena*. (R. 86, 186.) Pursuant to that settlement, District Judge Rudi Brewster issued notices dated September 30, 1993 to all potential claimants (including plaintiffs and the putative class in this lawsuit) informing them of their right to opt into the settlement. (R. 86, 186-94.) The opt-in notice recited the allegations of General Dynamics' alleged failure to properly compensate salaried employees under the FLSA. (R. 186.) The notice also listed the names and telephone numbers of plaintiffs' counsel to contact with questions. (R. 187.) The notice stated that the deadline for opt-ins was November 15, 1993. (*Id.*) The named plaintiffs here and the members of the putative class they seek to represent did not opt into the *Sena* suit.

On March 20, 1995, Judge Brewster entered an order retaining jurisdiction over the *Sena* settlement: "should further proceedings in [this case] become necessary o[r] desirable, any party may initiate it . . . ." (Ex. A attached to Appellee's Mot. to Take Judicial Notice before the Ninth Circuit.) Judge Brewster formally approved the *Sena* settlement on July 25, 1995, and continued to hear matters relating to the *Sena* settlement until

July 1996. (Exs. B-C attached to Appellee's Mot. to Take Judicial Notice before the Ninth Circuit.)

The Proceedings Below

As stated above, the named plaintiffs in this case are former employees of General Dynamics who were eligible to join *Sena* and participate in the *Sena* settlement, but who did not. (R. 148.) Plaintiffs received notice of the *Sena* settlement and an "opt-in" form. To participate in the settlement, the opt-in form had to be completed, signed on oath, and returned. (R. 148, 184-94.) Plaintiffs allege that they did not return the form because General Dynamics threatened plaintiffs that they "would suffer career harm" if they asserted claims for overtime wages or if they joined the *Sena* action. (R. 148, 161.) The putative class is alleged to consist of persons who were eligible to join *Sena* but who failed to join "because of statements at the workplace to the effect that asserting that right would jeopardize an employee's position with General Dynamics." (R. 148.) Plaintiffs allege that these threats constitute common law fraud because inherent in the threats was a promise of a "viable career" with General Dynamics, but made when General Dynamics had already decided to close the division where plaintiffs worked. (R. 156-60.)

Rather than pursuing their claims for threatened retaliation and interference with the *Sena* settlement before Judge Brewster or filing

their own FLSA complaint, plaintiffs sued in California state court for common law fraud, seeking unpaid overtime compensation and punitive damages. General Dynamics removed the case to the United States District Court for the Southern District of California, pursuant to 28 U.S.C. § § 1441, 1446. (R. 16-19.)

District Judge William Enright dismissed plaintiffs' amended complaint[3/] with prejudice, holding: (1) plaintiffs' claims that General Dynamics promised them "viable careers" were too vague to state a claim for fraud; (2) plaintiffs' claims were time barred; and (3) plaintiffs' claims were preempted by the FLSA. Judge Enright ruled that the FLSA provides the exclusive remedy for plaintiffs' claims and that plaintiffs cannot "circumvent the statutory remedy by re-labeling their claims as common law torts." (Pet. App. 38a.) Only the third ground -- preemption -- is involved in the instant petition.

Plaintiffs appealed. In pertinent part, the Ninth Circuit reversed the trial court's determination that plaintiffs' claims are preempted by the FLSA. The primary basis for the Ninth

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3/ Plaintiffs' original complaint was dismissed for failure to plead fraud with particularity under Rule 9 of the Federal Rules of Civil Procedure. (R. 141-44.)

Circuit's ruling was its view that the FLSA's anti-retaliation provision does not apply to employer threats intended to discourage employees from asserting their FLSA rights in the future. Because General Dynamics' alleged threats were "not covered by a FLSA provision," the Ninth Circuit reasoned, plaintiffs' claims did not conflict with the FLSA's enforcement scheme and therefore were not preempted by the FLSA. (Pet. App. 19a-20a.) The Ninth Circuit also held that despite the differing class action procedures between the FLSA (opt-in classes) and state law (opt-out classes) and differences in the applicable statutes of limitation, no preemptive conflict existed between the FLSA and state law fraud actions. (*Id.* at 19a-21a.) On the issue of punitive damages, the Ninth Circuit accepted the Seventh Circuit's decision in *Travis v. Gary Community Mental Health Ctr.*, 921 F.2d 108 (7th Cir. 1990), that punitive damages are available for FLSA section 215(a)(3) violations. The Ninth Circuit concluded that there is no conflict between the FLSA and state common law fraud. (Pet. App. at 19a-20a.)

REASONS FOR GRANTING THE PETITION

This case presents important questions regarding the rights of employees and the scope of the remedies available to them under the FLSA, including a split in the circuits on the issue of whether punitive damages are available under the FLSA. A proper consideration of the FLSA's

comprehensive remedial scheme and the legislative intent underlying that remedial scheme leads to the conclusion that the FLSA preempts plaintiffs' state law fraud action to recover FLSA overtime.

The FLSA contains an anti-retaliation provision that forbids an employer from firing or discriminating against employees who assert FLSA rights. 29 U.S.C. § 215(a)(3). This Court long ago recognized that the legislative purpose of the anti-retaliation provision was to allow employees to assert FLSA rights without "fear of economic retaliation." *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 292 (1960). But the decision below construed the FLSA's anti-retaliation provision very narrowly, holding that threats of future economic retaliation are not covered by the FLSA, and therefore that the FLSA does not preempt plaintiffs' state law fraud claims. The Ninth Circuit's decision creates an untenable anomaly: An employer may shield itself from FLSA liability simply by preventing employee overtime claims from being asserted in the first place by making threats of termination or other retaliation.

If the Ninth Circuit's decision is allowed to stand, employers will be allowed to successfully intimidate employees into not asserting their FLSA rights, including their right to opt into pending FLSA class actions. According to the Ninth Circuit, these intimidated employees have no remedy under the FLSA. This Court should grant the petition and

clarify that the FLSA's anti-retaliation provision does protect employees from threats of retaliation, as well as actual retaliation. *See Soler v. G&U, Inc.*, 690 F.2d 301, 302-03 (2d Cir. 1982) ("[u]ndoubtedly, threats of retaliation are also prohibited" by Section 215(a)(3)).

This case also presents the important question of whether the FLSA's comprehensive remedial scheme, including its unique class action procedures, may be circumvented by plaintiffs who choose, in the words of the district court below, to "re-label[] their [FLSA] claims as common law torts." In enacting the FLSA, and especially in amending its remedial provisions in the Portal-to-Portal Act of 1947, Congress struck a balance between the interests of employees and employers. In particular, the FLSA contains a class action mechanism and a statute of limitations that strikingly differ from state law class actions. First, class actions under the FLSA are "opt-in" actions, which individual plaintiffs must affirmatively elect to join before they become members of the class. In contrast, like Fed. R. Civ. P. 23(b)(3), class actions under California law and the law of many states are "opt-out" actions, in which individuals automatically become and remain members of the certified class. *See* Cal. Code Civ. Proc. § 382 (West 1999). Second, and related, the FLSA has its own statute of limitations, which continues to run until an individual joins a pending FLSA action or files her own suit. Again in contrast, under the rule of

American Pipe, the pendency of an opt-out class action, like a Rule 23 class action, generally tolls the applicable statute of limitations for absent class members. Third, the remedial provisions of the FLSA are compensatory, not punitive. Liquidated damages are available, but they are compensatory in purpose, available only in specific circumstances, and strictly limited in amount. However, punitive damages, if the Eleventh Circuit is correct (*see* below at 26-27), are not available under the FLSA, whereas common law fraud actions have the full availability of punitive damages.

The decision below, rejecting FLSA preemption, allows plaintiffs to circumvent all of these carefully drawn remedial limitations. In holding that the named plaintiffs in this case may enforce their FLSA rights in a purported opt-out class action brought under state common law fraud, the Ninth Circuit has displaced the FLSA's comprehensive remedial scheme and has ignored the congressional intent that underlay the Portal-to-Portal Act amendments to the FLSA. *See* H.R. Rep. No. 80-71 (1947), *reprinted in* 1947 U.S. Code Cong. Serv. 1029 (discussing FLSA's unique opt-in requirement, its statute of limitations, and its liquidated damages provisions). Moreover, the Ninth Circuit's ruling, in agreement with the Seventh Circuit, that punitive damages are available under the FLSA, conflicts with the Eleventh Circuit's ruling that they are not. *Snapp v. Unlimited Concepts, Inc.*, 208 F.3d 928, 933 (11th

Cir. 2000) (punitive damages not available for violation of the FLSA's anti-retaliation provision); *Travis v. Gary Community Mental Health Ctr.*, 921 F.2d 108, 111-12 (7th Cir. 1991) (punitive damages available). *See also Lanza v. Sugarland Run Homeowners Ass'n.*, 97 F. Supp. 2d 737 (E.D. Va. 2000) (acknowledging split in circuits; holding punitive damages not available).

By accepting this petition, this Court will have the opportunity to resolve important questions relating to the enforcement of the FLSA. The Ninth Circuit's decision is simultaneously too restrictive of employees' FLSA rights to be free from threats of economic retaliation and too permissive in allowing the carefully drawn remedial scheme of the FLSA to be circumvented.

I. THE DECISION BELOW UNDULY RESTRICTS THE FLSA'S ANTI-RETALIATION PROTECTIONS BY EXCLUDING COVERAGE FOR THREATS OF FUTURE ECONOMIC RETALIATION.

Under the Supremacy Clause, the doctrine of preemption requires any state law that "interferes with or is contrary to federal law" to yield to federal law. *Felder v. Casey*, 487 U.S. 131, 138 (1988). To avoid preemption, "it is not enough to say the ultimate goal of both federal and state law" is the same. *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Rather, a state law is preempted

"if it interferes with the methods by which the federal statute was designed to reach [its] goal." *Id.*; *see also Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 108-09 (1992) (state law preempted under conflict preemption even though it furthered federal goals of occupational health and safety).

This is particularly true when Congress has created a "careful balance" between competing policy objectives. *Edgar v. MITE Corp.*, 457 U.S. 624, 634 (1982). In *Edgar*, for example, the Supreme Court explained that in enacting the Williams Act, "Congress intended to strike a balance between the investor, management, and the takeover bidder." *Id.* The Court held that a state law's pro-management provisions were preempted because:

> [The provisions] upset the ***careful balance*** struck by Congress and . . . therefore stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress.

Id. (emphasis added). Similarly, in *International Paper*, the Supreme Court held that the federal Clean Water Act preempted state common law claims because they "circumvent[ed] the [federal regulatory structure], thereby ***upsetting the balance*** of public and private interests so carefully

addressed by the Act." 479 U.S. at 494 (emphasis added).

Where Congress has struck such a balance, state law "conflicts" with federal law "whenever two separate remedies are brought to bear on the same activity." *Wisconsin Dep't of Indust., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986) (citation omitted). Plaintiffs cannot pursue "regulatory or judicial remedies [under state law] for conduct prohibited [under federal law]." *Id.* The federal remedy is exclusive because "the range and nature of [the federal] remedies that are and are not available is a fundamental part of the comprehensive system established by Congress." *Id.* at 287 (citation omitted); *see also Pilot Life Ins. Co. v. DeDeaux*, 481 U.S. 41, 54 (1987) (where Congress has enacted comprehensive enforcement procedures, courts may reasonably conclude that "policy choices [are] reflected in the inclusion of certain remedies and the exclusion of others . . . .").

According to the Ninth Circuit, the FLSA's anti-retaliation provision does not protect an employee who, solely because of threats of retaliation by her employer, does not assert her rights under the FLSA. As shown below, the Ninth Circuit's holding conflicts with the pronouncements of this Court and others, which have interpreted Section 215(a)(3) broadly. Section 215(a)(3) applies here and it provides the exclusive remedy for the allegedly fraudulent threats, thus preempting

plaintiffs' duplicative, but conflicting, state common law claims.

The anti-retaliation provision of the FLSA provides that it is unlawful for an employer:

> [T]o discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3). As this Court has recognized, "it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees" to forgo the assertion of FLSA rights. *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 292 (1960). The FLSA's anti-retaliation provision serves the congressional purpose of assuring compliance with the FLSA through enhanced enforcement. *Id.*

The Ninth Circuit, in its attempt to provide a remedy to these particular plaintiffs, has done so at the expense of the FLSA's anti-retaliation protections for employees generally. The Ninth Circuit acknowledged that plaintiffs' fraud claims would be an obstacle to the enforcement of the

FLSA -- and therefore preempted -- if Section 215(a)(3) covered these claims and if the FLSA was the exclusive remedy for "rights duplicated by or equivalent of" FLSA rights. (Pet. App. 15a.) However, the Ninth Circuit held that "there is no conflict preemption because the anti-retaliation provision does not apply . . ." to the employer threats of retaliation alleged in this case. *Id.* at 20a. *See also id.* at 19a ("In this case, however, GD's allegedly fraudulent conduct was not covered by a FLSA provision."); *id.* at 15a ("Even under *Lambert's* [*Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 936 (2000)] broad reading of the FLSA's anti-retaliation provision, the appellants' career fraud claims are not covered.").

The Ninth Circuit's restrictive interpretation of the FLSA's anti-retaliation provision -- that threats of retaliation alleged by plaintiffs did not merit protection under Section 215(a)(3) -- conflicts with both the purpose and the text of that provision.

First, the central purpose of the FLSA's anti-retaliation provision is to encourage employees to assert their FLSA rights without fear of reprisal. In accordance with that principle, most of the circuits have taken an expansive view of Section 215(a)(3). *See Valerio v. Putnam Assocs.*, 173 F.3d 35, 41 (lst Cir. 1999) (expanding § 215(a)(3) to cover informal complaints); *Conner v. Schnuck Markets*, 121 F.3d 1390, 1393-94 (10th Cir. 1997) (same); *EEOC v.*

Romeo Community Schools, 976 F.2d 985, 989-90 (6th Cir. 1992) (same); *EEOC v. White & Sons Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989) (same); *Brennan v. Maxey's Yamaha*, 513 F.2d 179, 181 (8th Cir. 1975) (same). In *Valerio*, for example, the court noted the remedial purpose of Section 215(a)(3) and discussed the "bizarre" result that would occur if the FLSA failed to protect informal complaints of FLSA violations -- such a rule would create "an incentive for the employer to fire an employee as soon as possible after learning the employee believed he was being treated illegally." *Valerio*, 173 F.3d at 43.

The Ninth Circuit has created just such a "bizarre" incentive for an employer. Under the Ninth Circuit's holding that threats of retaliation are not covered by Section 215(a)(3), an employer has an incentive to threaten to retaliate against employees who are about to exercise their FLSA rights, but who have not yet done so. This result makes no sense, and it is contrary to this Court's observation that Congress' purpose in enacting Section 215(a)(3) was to prevent the "***fear*** of economic retaliation" from discouraging the exercise of FLSA rights. *See Mitchell*, 361 U.S. at 292 (emphasis added).

The Ninth Circuit's holding also conflicts with the decision of the Second Circuit in *Soler v. G & U, Inc.*, 690 F.2d 301, 302-03 (2d Cir. 1982). In *Soler*, the court noted that "undoubtedly threats of

retaliation are also prohibited . . . as are efforts to obtain withdrawal of FLSA claims by threats of retaliation." *Id.*; *see also Legutko v. Local 816 Int'l Bhd. of Teamsters*, 606 F. Supp. 352, 359 (E.D.N.Y. 1985) (threat of discharge justifies relief under FLSA's anti-retaliation provision; allowing it to "go unnoticed would be to largely undermine the function of § 215(a)(3)").

Second, Section 215(a)(3), by its express terms, protects employees who are "about to testify" in an FLSA proceeding and, therefore, covers the threats of retaliation alleged in this case. The amended complaint alleges that plaintiffs and the putative class members received notice of the *Sena* settlement, including an opt-in declaration required to be signed on oath, and that plaintiffs would have joined the *Sena* action by returning the opt-in declaration but for the alleged threats of retaliation. Thus, plaintiffs were "about to testify" by declaration in an FLSA proceeding -- *i.e.*, in the *Sena* action -- at the time they were allegedly threatened. Because Section 215(a)(3) explicitly protects employees who are "about to testify," the Ninth Circuit's decision is inconsistent with both the letter and the intent of the FLSA.

Indeed, the Ninth Circuit's holding leaves employees who are subjected to threats of retaliation with potentially no remedy for the employer's action: Under the Ninth Circuit's holding, the FLSA's anti-retaliation provision does

not protect them. And, unless the employer's conduct happens to fall within a state law or tort, the employees will have no state remedy either.

II. THE NINTH CIRCUIT'S DECISION THAT PLAINTIFFS MAY ASSERT STATE COMMON LAW FRAUD CLAIMS TO ENFORCE FLSA RIGHTS CONFLICTS WITH THE FLSA'S COMPREHENSIVE REMEDIAL SCHEME AND THE LEGISLATIVE INTENT OF CONGRESS IN PASSING THE PORTAL-TO-PORTAL ACT OF 1947.

The Ninth Circuit said that plaintiffs' claims were not preempted by the FLSA because, according to the panel, the remedies and procedures available under the FLSA and California law were fundamentally the same. However, the respective remedies and procedures are radically different in at least three major respects: opt-in versus opt-out classes, the statute of limitations, and punitive damages. The Ninth Circuit's holding ignores the legislative intent underlying the important 1947 amendments to the FLSA and, as a result, conflicts with almost every reported decision that has addressed the issue of the FLSA's exclusive remedy.

Early in the history of the FLSA, courts confronted with the issue of whether the FLSA preempted state statutory remedies decided that the states were without power to provide additional

remedies. In *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945), for example, this Court held that the FLSA's remedial structure precluded an award of interest because the FLSA provided for liquidated damages but not interest. *Id.* at 714-15. This Court reasoned that because liquidated damages and an award of interest each serve a similar purpose, Congress must have intended to preclude the recovery of interest when it enacted the FLSA. *Id.*; *see also Berry v. 34 Irving Place Corp.*, 4 Wage & Hour Cas. (BNA) 564, 8 Lab. Cas. (CCH) ¶ 62,265 (S.D.N.Y. 1944) (states were without power to provide additional remedies because Congress intended to provide a uniform rule of damages; rejecting argument that overtime claims sounded in contract, for which prejudgment interest was recoverable).

If there were any doubt concerning the exclusivity of the FLSA's remedies, that doubt was laid to rest when Congress amended the FLSA in the Portal-to-Portal Act of 1947. 61 Stat. 84 (1947), 1947 U.S. Code Cong. Serv. 81, (codified at 29 U.S.C. §§ 251-262 and amending portions of 29 U.S.C. § 201 *et seq.*) ("the Act"). Through the Act, Congress cut back on the rights originally afforded by the FLSA. For example, prior to the Act: (i) the applicable state statute of limitations governed claims brought pursuant to the FLSA; (ii) the rule on class actions was liberal, modeled after the Federal Rules; and (iii) the double damages recovery was available in all cases, without regard to

culpability. *Lerwill v. Inflight Motion Pictures, Inc.*, 343 F. Supp. 1027, 1029 (N.D. Cal. 1972).

In the Act, however, Congress (i) restricted class recoveries by requiring employee-plaintiffs to file with the court a consent in writing to become a party (*i.e.*, an opt-in requirement) (§ 216(b)); (ii) imposed a two-year federal statute of limitations (three years for wilful violations) (§ 255); and (iii) restricted the award of liquidated damages (§ 260). *Lerwill*, at 1029. As one court has observed, in enacting the Act:

> Congress carried on the delicate process of balancing the competing policies of (1) strict enforcement of the statutory objective of insuring minimally acceptable pay levels and (2) the avoidance [to employers] of the economic disruption of unanticipated liabilities. In so doing Congress created a remedy conditioned with both advantages and disadvantages to the claimant. It would be difficult indeed to find any purpose in that careful process if alternative remedies, varying with variations of state law were also to be available in any case in which the alternative seemed more advantageous to the plaintiff-employee seeking to enforce his § 207 rights.

Id.; *see also* 29 U.S.C. § 251(a) (amending FLSA, in part, to remedy "wholly unexpected liabilities" that "would bring about financial ruin of many employers and seriously impair the capital resources of many others"); *Thompson v. Sawyer*, 678 F.2d 257, 278 (D.C. Cir. 1982) (FLSA's countervailing purpose is to avoid the imposition of "unjustly harsh" liabilities on employers); *Marshall v. Frozen Assets, Ltd.*, 513 F. Supp. 591, 595 (E.D. Mo. 1981) (referring to "the balance struck by Congress under the Portal-to-Portal Act" between the rights of employees and employers).

With this as its backdrop, federal courts that have since addressed the issue are virtually unanimous in their conclusion that the exclusive remedies available to an employee to enforce legal rights created by the FLSA are the statutory remedies provided therein.[4/]

4/ *See, e.g., Roman v. Maietta Constr.*, 147 F.3d 71, 76 (1st Cir. 1998) ("the FLSA is the exclusive remedy for enforcement of rights created under the FLSA") (citations omitted); *Barfield v. Madison County*, 984 F. Supp. 491, 509 (S.D. Miss. 1997) (same); *Petras v. Johnson*, No. 92-CIV 8298 (CSH), 1993 U.S. Dist. LEXIS 8464, at *4 (S.D.N.Y. June 22, 1993) (same); *Tombrello v. USX Corp.*, 763 F. Supp. 541, 545 (N.D. Ala. 1991) (same); *Nettles v. Techplan Corp.*, 704 F. Supp. 95, 100 (D.S.C.

(continued...)

The Ninth Circuit's ruling, however, will subject employers to state law tort claims, such as the fraud claim here, that provide remedies far beyond those that Congress intended and, in some cases, remedies that Congress expressly rejected. The state law remedies sought in this case conflict with the FLSA's remedial scheme in three essential respects, which warrant a finding of conflict preemption in this case.

(1) ***Opt-in versus opt-out classes***. The FLSA provides for an opt-in class action procedure rather than the traditional opt-out procedure employed in Fed. R. Civ. P. 23 and in the typical state class action statutes. Under the FLSA, each plaintiff must affirmatively opt into the pending class action to become a member of the class:

> (b) . . . An action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action

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4/ (...continued)
1988) (same); *Madrigal v. Green Giant*, No. C-78-157, 1981 U.S. Dist. LEXIS 15325, at *7-9 (E.D. Wash. July 27, 1981) (same); *Lerwill*, 343 F. Supp. at 1029 (same).

> unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought . . .

29 U.S.C. § 216(b). The differences between the opt-in and opt-out class action procedures are substantial. The FLSA's opt-in procedure is much more restrictive, which reflects the congressional intent "to define and limit the jurisdiction of the courts" in FLSA actions. H.R. Rep. No. 80-71 (1947), 1947 U.S. Code Cong. Serv. 1029, 1029. *See Sperling v. Hoffman-LaRoche, Inc.*, 24 F.3d 463, 468-69 (3d Cir. 1994) (an opt-out class action "differs in important respects from the opt-in class permitted by section 16(b) of FLSA"; FLSA's "restrictive provisions" reflect congressional intent to limit employers' FLSA liability). In opt-out class actions, employees automatically become and remain class members unless they affirmatively opt out of the class. Among other things, allowing FLSA claims to be litigated as opt-out class actions would dramatically increase an employer's potential liability. That may or may not be a good policy choice, but it is ***not*** the choice Congress made in the FLSA.

(2) ***Statute of limitations.*** The FLSA's statute of limitations differs markedly from most state statutes in two respects. First, as a corollary to the FLSA's opt-in class, the statute of limitations continues to run on the claims of any individual

class member -- *i.e.*, the statute is not tolled -- until that individual files with the court a written consent to join the pending action. 29 U.S.C. § 256. In contrast, the filing of an opt-out class action typically tolls the statute of limitations during the pendency of the class action. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). The FLSA's rejection of tolling reflects the conscious decision of Congress in the 1947 Portal-to-Portal Act. *See* H.R. Rep. No. 80-71, 1947 U.S.C.C.S. at 1035. ("As to the individual claimant, the action is deemed to be commenced when he is named as a party to the action. In other words, the commencement of an action does not stop the running of the statute for all those who later become parties."); *Sperling*, 24 F.3d at 469 ("Thus, when Congress enacted the Portal-to-Portal Act of 1947 . . . it severely restricted the claims an employee could make for back wages by various means, including a strict statute of limitations.").

In addition to adopting a strict statute of limitations with no provision for tolling, Congress intended that the FLSA should be governed by "a uniform Federal statute of limitations" to redress the "confusion" caused by the then existing lack of uniformity. H.R. Rep. No. 80-71, 1947 U.S.C.C.S. at 1035. The decision below frustrates congressional intent because it permits the substitution of state statutes of limitation in actions to enforce FLSA rights, which was the pre-1947 practice that Congress expressly rejected in

amending the FLSA in 1947. The Ninth Circuit considered the difference between the FLSA's and California's statutes of limitation to be insignificant, only "three years compared with two years." (Pet. App. 20a.) But that misses the point: Congress wanted uniformity. Moreover, many states have longer fraud limitations periods than California -- for example, New York or Illinois, where the fraud limitations periods are six years and five years, respectively.[5/] The Ninth Circuit's decision, therefore, means that the limitations difference between a state fraud action and an FLSA action is not merely "three years compared with two years."

(3) ***Punitive damages***. The FLSA's remedial scheme also differs from the remedies available under state common law fraud with respect to the availability of punitive damages. The Eleventh Circuit has carefully analyzed the FLSA's remedial structure and has concluded that it reflects a congressional decision to provide civil plaintiffs with compensatory relief only, and not punitive damages. *Snapp v. Unlimited Concepts*, 208 F.3d 928, 933 (11th Cir. 2000) (punitive damages are not available for Section 215(a)(3) violations). In determining that there was no conflict between plaintiffs' common law fraud claim and the FLSA, the Ninth Circuit agreed with the Seventh Circuit

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5/ N.Y. C.P.L.R. § 213; 735 Ill. Comp. Stat. 5/13-205.

that punitive damages are available for Section 215(a)(3) violations, citing *Travis v. Gary Community Mental Health Ctr.*, 921 F.2d 108, 112 (7th Cir. 1990).[6/] This circuit split on the issue of whether punitive damages are available for Section 215(a)(3) violations should be resolved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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6/ The Eleventh Circuit's decision in *Snapp* to the contrary was handed down on April 5, 2000, seven days before the Ninth Circuit's decision in this case.